

PRIVATE SECURITY IN AUSTRALIA: SOME LEGAL MUSINGS

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Given the rapid expansion of the private security commercial sector, one might assume that careful attention would have been paid to the legal framework within which the activities of security personnel take place. Unfortunately, this has not been the case. The legal rights and powers of private security providers are determined by little more than a piecemeal array of common law principles, practical assumptions and ad hoc legislation that was designed principally for property owners and private citizens. The powers and immunities of private security personnel are thus unclear, inconsistent, change from jurisdiction to jurisdiction, and differ markedly from those of the public police even though they are often carrying out many of the same tasks in the same locales. As policing moves more and more into private hands, the legal powers and immunities that apply to private security personnel need attention. This paper looks at the legal options available to policy-makers to address the situation.

I. INTRODUCTION

The law that impacts private security personnel emanates from a range of sources usually unrelated to security issues. These may include common law and legislation relating to the protection of property, the use of reasonable force in self-defence, arrest, and the use (or misuse) of surveillance devices to name but a few. The law is thus often confusing not only for security providers but the public at large. This paper identifies these issues with a view to making some recommendations for reform.¹

Who are we talking about when we refer to ‘private security personnel’? For the purposes of this paper they are defined as people who are employed or sponsored by a commercial enterprise on a contract or ‘in-house’ basis, using public or private funds, to engage in tasks (other than vigilante action) where the principal component is a security or regulatory function.²

This definition acknowledges the importance not only of privately employed crowd controllers and other security guards who are very much the visible face of the industry, but also those non-state personnel who are financed and managed by governments and local (public) instrumentalities to engage in policing roles that are not entirely public or private. For example, this definition includes private investigators in government welfare departments, or security staff working in a public organisation such as a hospital or university. It includes the people who screen air travellers or who monitor CCTV at sports grounds. It includes static guards at public venues, debt collectors, bailiffs, and private investigators. The numbers are significant, and growing.³

Given the rapid expansion of the presence of private personnel in security activities, it is surprising that so little attention has been paid to the legal framework under which they work.⁴ One of key reasons is the vast array of settings in which security personnel operate. The

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1 The author is indebted to Pauline Collins of the University of Southern Queensland for her insightful comments and suggestions on an earlier version of this paper.

2 See Rick Sarre and Tim Prenzler, *The Law of Private Security in Australia* (2nd ed, 2009) 4.

3 There may be more than 100,000 such personnel in Australia today; *ibid* 21.

4 See Rick Sarre, ‘Researching Private Policing: Challenges and Agendas for Researchers’ (2005) 18(3) *Security Journal* 57; Tim Prenzler, Karen Earle, and Rick Sarre, ‘Developments in the Australian Security Industry’ (2008) 10(3) *Flinders Journal of Law Reform*, 403–17.

sheer panoply of options militates against any attempt to legislate for (and regulate) security personnel other than on an *ad hoc* basis. True, there has been legislation passed in all Australian jurisdictions concerning the registration, licensing, identification and training of private legal personnel, especially in the past decade.⁵ However, the main aim of this legislation is to require licences for those who operate within the industry, and to check those who wish to enter it against certain criteria and minimum training standards. The legislation does not deal with powers *per se*. There is very little in Australian legislation, and even less in the common law, that permits security guards, even licensed guards, to use specific powers. Indeed, in two jurisdictions it is specifically mentioned in security licensing legislation that no powers are to be associated with the holding of a licence. Section 8 of the *Security Industry Act 1997* (NSW) says that the holder of any licence can carry out the functions authorised by the licence but that '[a] licence does not confer on the licensee any function apart from a function authorised by the licence.' Section 15(1) of the *Security and Investigation Agents Act 1995* (SA) goes a little further, stating that '[a] licence does not confer on an agent power or authority to act in contravention of, or in disregard of, law or rights or privileges arising under or protected by law.' Section 15(2) then repeats the NSW legislative proscription that applies to those who would try to bluff the public into thinking that they have police-type powers. It states that '[a] licensed agent must not hold himself or herself out as having a power or authority by virtue of the licence that is not in fact conferred by the licence.'

This lack of clear law should be of concern, given the rapid expansion of the security industry and its importance to the modern policing landscape.⁶ It is not uncommon to hear commentators say that the private security industry now undertakes almost every function that the public police do.⁷ The public has witnessed over the last three decades a dramatic growth in the numbers of state-based specialist security officers. It should be of some concern that their numbers and duties have expanded with so little thought given to questions of powers, immunities and liabilities.

The paucity of law guiding this field of endeavour is confusing for security personnel and the public alike. There are few legal decisions and precedents emerging from the courts. Hence it is difficult to find, let alone describe, a satisfactory body of law on the subject.

In contrast, public police have coercive and intrusive powers. There are thus distinct differences between the powers of public and private officers and agents. For example, public police are given statutory immunity from civil suit in circumstances where their beliefs and acts are 'reasonable.' Private personnel are afforded no such luxury. Indeed, private security remain vulnerable and constantly run the risk of being sued in the torts of assault, false imprisonment, intentional infliction of mental distress, defamation, nuisance and trespass to land and to the person. This is not to say that police do not run these risks, but because they have legal immunities at their disposal, they are far less likely to find themselves on the losing end of a civil suit brought by an aggrieved litigant.

Moreover, public police may act to prevent the commission of an offence *before* it actually happens (acting upon a suspicion). This concession is not granted to private security personnel (or anyone else for that matter). Public police powers, duties, rights, responsibilities and immunities have been so often debated in the courts that there is now a large and continually expanding body of law on these issues. The same cannot be said for private security law.

In short, the public police have considerable powers to arrest, search and interrogate. Liberty is at stake if these powers are abused; hence they have been debated in Parliaments and tested in

⁵ *Security and Investigation Agents Act 1995* (SA); *Security Industry Act 1997* (NSW) amended by the *Security Industry Amendment Act 2005* (NSW); *Private Security Act 1995* (NT); *Security Providers Act 1993* (Qld); *Security & Investigations Agents Act 2002* (Tas); *Private Security Act 2004* (Vic); *Security and Related Activities (Control) Act 1996* (WA); *Security Industry Act 2003* (ACT). There is no national licensing code in Australia although the Council of Australian Governments ('COAG') is moving to a national system of licensing guarding and manning services in 2011. See: COAG, <www.coag.gov.au> at 17 November 2010.

⁶ Trevor Jones and Tim Newburn, *Private Security and Private Policing* (1998).

⁷ Mark Button, 'Assessing the Regulation of Private Security Across Europe' (2007) 4(1) *European Journal of Criminology* 109–28, 110.

courts for decades. By contrast, the law relating to the activities of private security personnel, who often engage in many of the same tasks, remains largely untested.

II. POWERS AND IMMUNITIES: SPECIFIC EXAMPLES

The legal powers, rights and immunities of private security personnel are located generally across four legal fields: the criminal law; the law of property; the law of contract (both in terms of contracts of employment, and the contracts that apply to paying customers whenever they enter a private sports or entertainment venue); and employment law.

The two issues that are the subject of this paper are the use of force in defence of property, and the power of arrest.⁸ These issues have been chosen because they are activities in which both public police and private security personnel are regularly called upon to act. In both of these examples the law applicable to police is reasonably clear, but the rules relating to private security personnel are a hotchpotch. They vary from place to place, which can be very confusing for the security personnel who have licences in more than one jurisdiction.

Following the outline of the relevant law (below) is a discussion of whether the current situation is a tenable or untenable one, and, if the latter, whether legislative intervention is required and appropriate.

A. *The Use of Force in Defence of Property*

In most States and Territories, the common law power of property owners to defend their property from uninvited trespassers and not face criminal prosecution has been reinforced by statute. Although it has not been tested in court, one could argue that the security personnel (as agents) defending their principal's property should be given the same latitude as those principals. This may include using force to thwart unlawful taking, damage or interference, or to prevent criminal trespass to any land or premises and to remove a person committing a civil or criminal trespass.⁹ The rules, as we shall see, vary widely from jurisdiction to jurisdiction.

In South Australia, the *Criminal Law Consolidation Act 1935* (SA) has a substantially subjective test: did the accused have reason to believe that his or her life or property was in danger when acting in a defensive manner? If she or he did, then she or he will be able to establish a defence. But the actual section is convoluted and lengthy, making it difficult to interpret.

15A—Defence of property etc

(1) It is a defence to a charge of an offence if—

- (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable—
 - (i) to protect property from unlawful appropriation, destruction, damage or interference; or
 - (ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or
 - (iii) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and
- (b) if the conduct resulted in death—the defendant did not intend to cause death nor did the defendant act recklessly realising that the conduct could result in death; and
- (c) the conduct was, *in the circumstances as the defendant genuinely believed them to be*, reasonably proportionate to the threat that the defendant genuinely believed to exist ... [emphasis added]

⁸ The law that relates to both derives from a mixture of the law of property and the criminal law.

⁹ See generally Sarre and Prenzler, above n 2, ch 4.

If the accused can satisfy a judge or jury of his or her genuine belief, then he or she will not be found guilty of any assault or battery that may have occurred during that defence of property. In the *Criminal Code 1899* (Qld) there is a roughly equivalent section (277(1)), but it persists with a more objective test. Unlike the South Australian law, it specifically extends the right to an agent (for example, a security guard) of the property owner or occupier, thus:

It is lawful for a person who is in peaceable possession of any land, structure, vessel, or place, or who is entitled to the control or management of any land, structure, vessel, or place, *and for any person lawfully assisting him or her or acting by his or her authority*, to use such force as is reasonably necessary in order to prevent any person from wrongfully entering upon such land, structure, vessel, or place, or in order to remove therefrom a person who wrongfully remains therein, *provided that he or she does not do grievous bodily harm to such person*. [emphasis added]¹⁰

This legislative power also extends to those who are trying to prevent someone from thieving. This is found in section 274 of the *Criminal Code 1899* (Qld):

It is lawful for any person who is in peaceable possession of any moveable property, *and for any person lawfully assisting him or her or acting by his or her authority*, to use such force as is reasonably necessary in order to resist the taking of such property by a trespasser, or in order to retake it from a trespasser, *provided that the person does not do grievous bodily harm to the trespasser*. [emphasis added]

So the power to use force extends to agents. The force to be used is limited, too. It cannot cause grievous bodily harm.

There is a similar provision in Western Australia (both as to objectivity and extension to agents) under the *Criminal Code Act 1913* (WA). Section 254 of this Act allows an occupant some latitude in determining what amounts to ‘reasonable’ force:

254 (1) ...

(2) It is lawful for a person (‘the occupant’) who is in peaceable possession of any place, or who is entitled to the control or management of any place, to use such force as is reasonably necessary

- (a) to prevent a person from wrongfully entering the place;
- (b) to remove a person who wrongfully remains on or in the place; or
- (c) to remove a person behaving in a disorderly manner on or in the place;

provided that the force used *is not intended, and is not such as is likely, to cause death or grievous bodily harm to the person*.

(3) The authorisation conferred by subsection (2), as limited by the proviso to that subsection, *extends to a person acting by the occupant’s authority* except that if that person’s duties as an employee consist of or include any of the matters referred to in subsection (2) (a), (b) or (c) *that person is not authorised to use force that is intended, or is likely, to cause bodily harm*. [emphasis added]

The effect of section 254(3) of the *Criminal Code Act 1913* (WA) is to differentiate the powers of landowners (who can use force up to grievous bodily harm) from those of their agents (who must not have intended any bodily harm, that is, a lesser amount of harm). In other words, the Western Australian Parliament is more wary when it comes to the power of agents to use force on behalf of their principals.

There is a similar provision in the *Criminal Code* (NT). By virtue of section 27, force in self-defence, defence of property and arrest ‘is justified provided it is not unnecessary force and it is not intended and is not such as is likely to cause death or grievous harm.’ Such force can be used by *agents* of owners as permitted by section 27(k) of the *Criminal Code* (NT):

¹⁰ *Criminal Code 1899* (Qld) s 277(1).

- (k) in the case of a person who is entitled by law to the possession of moveable property, or a person acting by his authority, and who attempts to take possession of it from a person who neither claims right to it nor acts by the authority of a person who claims right to it and the person in possession resists him, to obtain possession of the property, *provided he does not intentionally do him bodily harm*. [emphasis added]

New South Wales, too, has legislated concerning the defence of one's property, but it does not appear to extend to agents of the owner or occupant and there is no standard of harm mentioned. Section 418 of the *Crimes Act 1900* (NSW) states:

- (1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:
- (a) to defend himself or herself or another person, or
 - (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
 - (c) to protect property from unlawful taking, destruction, damage or interference, or
 - (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,
- and the conduct is a reasonable response in the circumstances as he or she perceives them.

By virtue of section 419 of the *Crimes Act 1900* (NSW), the prosecution has the onus of proving, beyond reasonable doubt, that the defendant was not acting in self-defence. Significantly, self-defence is not available in New South Wales if the death of the attacker has resulted¹¹ but it may reduce murder to manslaughter¹².

Section 462A of the *Crimes Act 1958* (Vic) allows any person (presumably including an agent of a property owner or any citizen) the right to use force:

not disproportionate to the objective as he believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.¹³

In the Australian Capital Territory, there is no provision in the *Crimes Act 1900* (ACT) that grants a defendant a 'defence of property.'

Thus it is clear that, at both common law and in the Code jurisdictions, legitimate force can be used to protect one's own property, and in self-defence. But the provisions are widely diverse and inconsistent between jurisdictions, especially with regard to owners or occupants giving agents (private security) authority to undertake defence of property roles on their behalf. One can safely say, however, that excessive force is, as a rule, penalised by the criminal law unless there are exceptional reasons for its deployment. What is 'excessive' and 'exceptional' depends upon the facts of each case and the jurisdiction concerned.¹⁴

11 *Crimes Act 1900* (NSW) s 420.

12 *Crimes Act 1900* (NSW) s 421.

13 This assumes, of course, that people understand the distinction between indictable and non-indictable offences.

14 If there has been negligence, trespass, nuisance or breach of statutory duty, the liability of police officers rests on the same general principles that apply to individuals; see *Northern Territory v Mengel* (1995) 129 ALR 1. However, there may be a category of a duty of care in circumstances where governments should have foreseen harm and did not take steps to ensure their officers knew and observed the limits of their power. See Charles Sampford, 'Law, Institutions and the Public/Private Divide' (1991) 20 *Federal Law Review* 185; Margaret Allars, 'Private Law But Public Power: Removing Administrative Law Review from Government Business Enterprises' (1995) 6 *Public Law Review* 44.

Because of their simplicity and clarity, the New South Wales provisions are certainly the easiest to comprehend. Moreover, the reversal of onus of proof (requiring the prosecution to prove that the person was *not* acting in self-defence) makes the NSW approach rather appealing. Having said that, the Western Australian and Northern Territory approaches that differentiate between the latitude given to owners as opposed to their agents to use force in defence of property makes very good sense. It is an approach that ought to be adopted by all other jurisdictions.

B. *The Power of Citizen's Arrest*

Police officers can detain any person upon suspicion of that person committing an offence by virtue of specific legislation or the common law. If their suspicions turn out later to be incorrect, they are generally immune from civil suit. In addition, all police officers have the right to arrest any person without a warrant on suspicion that an offence is about to be committed. By virtue of their discretionary powers, police officers, generally speaking, are permitted a general defence of reasonable suspicion or honest exercise of power.

Private citizens (including security officers acting on instructions from their principals, or, indeed, civilian police auxiliaries), on the other hand, have no power to detain or arrest any persons without their consent unless they are given authority to do so either by some specific legislative power or in circumstances where their actions are justifiable by virtue of the common law. Even then, the 'citizen's arrest' is limited to detaining the suspect until the public police arrive. That is, private citizens (including private security agents) do not enjoy the immunities that public police officers have, and do not have a defence of reasonable suspicion or honest exercise of power if they make an incorrect judgment. Moreover, they cannot arrest any persons on suspicion of their being *about* to commit an offence.

The rules relating to citizen's arrest in Australia are unnecessarily complicated. They change from jurisdiction to jurisdiction. In some jurisdictions, the right of private citizens, security guards and police auxiliaries to make an arrest is limited to 'indictable' matters as opposed to 'summary' offences. It is unlikely that a citizen or security guard will know what that means. In the Code jurisdictions the law is more clearly stated. Let us turn to each now.

In South Australia the citizen's arrest power is outlined in section 271 of the *Criminal Law Consolidation Act 1935* (SA). Under this section, persons can arrest and detain any person whom they find in the act of committing (or having just committed) an indictable offence, larceny, offence against the person, or offences against property.

In Victoria, section 462A of the *Crimes Act 1958* (Vic) allows any person the right to use force:

not disproportionate to the objective as he believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.

In New South Wales the law is governed by section 100 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). A citizen can arrest another person where: (a) the person is in the act of committing an offence under any Act or statutory instrument, or (b) the person has just committed any such offence, or (c) the person has committed a serious indictable offence for which the person has not been tried.

So, in each of these jurisdictions, private citizens would need to know the difference between indictable and non-indictable offences, and the elements of the offence. Moreover, in Victoria, they would need to be able to establish whether the circumstances of the arrest could legitimately support their use of force.

It was only in 2004 that the Western Australian Parliament repealed the provisions of the former section 47 of the *Police Act 1892* (WA) which allowed any person to arrest without a warrant:

any reputed common prostitute, thief, loose, idle or disorderly person, who, within view of such person apprehending, shall offend against this Act, and shall forthwith

deliver him to any constable or police officer of the place where he shall have been apprehended, to be taken and conveyed before a Justice, to be dealt with according to law ...

That jurisdiction now locates its citizen's arrest powers in section 25 of the *Criminal Investigation Act 2006* (WA). Sub-section (2) states that '[a]ny person may arrest another person (the suspect) if he or she reasonably suspects that the suspect has committed or is committing an arrestable offence.'

Section 546 of the Queensland *Criminal Code Act 1899* (Qld) allows for any person to arrest another person in circumstances where an offence has been committed or is being committed. It stops short of allowing a pre-emptive arrest. An arrest, too, can only occur 'by night' if a person has 'reasonable grounds for believing that the other person is committing the offence, and ... does in fact so believe...'¹⁵

Under section 441(2) of the *Criminal Code* of the Northern Territory, any person can arrest another whom he or she finds committing an offence or behaving such that he or she believes on reasonable grounds that the offender has committed an offence and that an arrest is necessary for a range of specified reasons. Likewise, section 218 of the *Crimes Act 1900* (ACT) permits a citizen's arrest.

By virtue of section 55(3) of the *Police Offences Act 1935* (Tas), any person may arrest any other person whom they find offending where they have reasonable grounds to believe that the conduct will create or may involve substantial injury to another person, serious danger of such injury, loss of property or serious injury to property. Of especial interest is subsection (4) which could be interpreted to allow a citizen a pre-emptive arrest:

For the purposes of this section, an offence shall be deemed to involve any of the matters specified in subsection (3) if the person arresting has reasonable grounds for believing that such matter has been, or will be, the consequence of any act of the offender in committing such offence. [emphasis added]

But subsection 55(5) of the *Police Offences Act 1935* (Tas) appears to dispute any such interpretation by using the terminology 'found offending' and 'committed an offence against this Act' which is clearly in the past tense.

One can safely conclude, generally, that where it is clear on the evidence that a private citizen, or security officer, in detaining a suspect, acted reasonably and the suspect unreasonably, then it is likely that the court will find in favour of the citizen or security officer and against the suspect if that suspect chooses, later, to sue the citizen for assault or false imprisonment. In other circumstances where, say, a property owner (or an agent) arrests a thief in a manner, and in circumstances, disproportionate to the likely harm to the victim, and in clear defiance of the rights of the suspect (for example, to be taken forthwith to a police station), then the court is very likely to find in favour of the suspect (guilty or otherwise) in a later civil suit.

In the High Court case of *Williams v The Queen* (1986) 161 CLR 278 Mason and Brennan JJ articulated the balancing act required. The case involved police officers, but the principles espoused could apply equally to cases involving citizen's arrest:

The jealousy with which the common law protects the personal liberty of the subject does nothing to assist the police in the investigation of criminal offences. ...The competing policy considerations are of great importance to the freedom of our society and it is not for the courts to erode the common law's protection of personal liberty in order to enhance the armoury of law enforcement.¹⁶

The courts thus look for a middle path.¹⁷ For its clarity, simplicity and brevity in achieving a balanced approach, and its avoidance of the potentially confusing use of the word 'indictable', the Western Australian provisions are to be preferred as a model for other jurisdictions.

15 Criminal Code Act 1899 (Qld) section 546 (e).

16 *Williams v The Queen* (1986) 161 CLR 278, 296 (Mason and Brennan JJ).

17 Rick Sarre, 'The Law in Australia on Citizen's Arrest' (2010) 1(2) *Australasian Policing: A Journal of Professional Practice and Research* 9-10.

III. SPECIFIC POWERS GRANTED TO NON-POLICE

Given the possibility for confusion between the rights of security personnel as members of the public and their powers as persons exercising authority on behalf of others, there have been some attempts by Australian Parliaments to grant powers to specified officers in certain settings. These powers, however, remain strictly within each manifestation. It is useful to review some of them here.

A. *Australian Protective Service Officers*

The Australian Protective Service ('APS') was established in 1984 as a government agency that provides specialist protective security to government departments on a contractual 'fee-for-service' basis. Its core business responsibility is to provide security services at, for example, Parliaments and government residences, foreign diplomatic missions, the Australian Nuclear Science and Technology Organization ('ANSTO') and defence establishments, and to staff counter-terrorism units at major airports. Australian Protective Service officers ('PSOs')¹⁸ are invested with specific protective security law enforcement powers beyond those enjoyed by private sector operatives, but less than those available to Australian Federal Police. They are empowered by the *Australian Protective Service Act 1987* (Cth), the *Crimes Act 1914* (Cth); and the *Australian Federal Police Act 1979* (Cth) to arrest without warrant any person contravening specific Commonwealth laws.¹⁹

B. *Maritime and Aviation Security Officers*

Under the *Maritime Services Act 1935* (Cth) and the *Aviation Transport Security Act 2004* (Cth), appropriately trained and licensed private security officers assume the powers that are vested in them by these Acts. These officers are empowered to carry out security duties especially designed to preserve the integrity of critical infrastructure.

C. *Protective Security Officers (SA)*

The *Protective Security Act 2007* (SA) created the position of Protective Security Officer (PSO). PSOs are not linked to any specific body of police, nor are they engaged for a specific event. They are not sworn police officers. PSOs are appointed and managed, however, by the Police Commissioner, who has power to discipline them. They are empowered to provide a first response to terrorist incidents and to protect buildings, vehicles, officials and designated places. Consequently they are resourced with a range of tactical options that can include the use of firearms, batons and capsicum spray. PSOs are not expected, nor are they required, to become involved in complex police activities or investigations. They do not have powers of a constable. Some PSOs have the power to wear and to deploy firearms.²⁰ PSOs have the authority to give reasonable directions, refuse entry, direct a person to leave a location, require persons to state their reason for being at a certain location and require persons to state their name and address and to provide identification when requested. They are able to conduct searches on persons,

18 In 2004, by virtue of the *Australian Federal Police and Other Legislation Amendment Act 2004* (Cth), federal APS officers are now referred to as Protective Service Officers (PSOs). There are approximately 1,400 in Australia currently.

19 For example, powers relating to the protection of internationally protected persons (*Crimes (International Protected Persons) Act 1976* (Cth)), the protection of Commonwealth Territories, establishments and functions (*Public Order (Protection of Persons and Property) Act 1971* (Cth)), the protection of aircraft (*Crimes (Aviation) Act 1991* (Cth) and *Air Navigation Act 1920* (Cth)), the protection of works, undertakings and areas in order to enable Australia to fulfil its obligations under international agreements relating to defence or security (*Defence (Special Undertakings) Act 1952* (Cth)), and to protect and maintain nuclear safeguards in Australia (*Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth)).

20 Other States have similar bodies, for example: VicPol has a protective security branch; NSW police have special constables (on an *ad hoc*, user-pays basis); and Queensland's *State Building Protective Security Act 1983* (Qld) creates a State Government Protective Service that operates on a commercial basis too.

vehicles or property under certain circumstances, and seize items and evidence. They can detain a person for a ‘Protective Security Offence.’²¹

D. *Project Griffin volunteer officers*

Project Griffin²² is the name given to the program where certain privately-based security personnel are ‘on call’ for emergency responses. These officers remain employed principally in other ‘security’ occupations, usually as security managers of selected Central Business District (‘CBD’) buildings. Project Griffin was developed by the City of London Police in 2004. The idea of the project is to have, at the ready, a significant number²³ of private security officers, specifically ‘Griffin-trained’, available to help police if there is a major incident, such as a terrorist attack. The powers of these officers (and they are very limited powers indeed) only come into play when a terrorism incident occurs and they are called up for ‘critical incident management’ duty, principally to man police cordons and control access to areas affected by terrorist acts. A variety of Project Griffin has been launched by Victoria Police (‘VicPol’) and operates, in a limited fashion, around the Melbourne CBD under the auspices of VicPol’s Counter-terrorism Coordination Unit which was set up in 2005.²⁴

IV. DISCUSSION

When exceptional authority is bestowed upon those who administer and enforce the law, it requires legislative action through Parliamentary debate. For that reason, the rules regulating public policing are set out prospectively to authorise the taking of particular action, and also retrospectively to show interested forums, such as the courts and Parliaments, that the action was justified in the circumstances.²⁵

Private security personnel and private operatives are now undertaking many of the same policing roles as police officers, but the laws that apply to empower and restrict them are not in the same league, and there is an argument that they should be better articulated by Parliaments. Broadly-based legislation giving specific powers to all licensed agents, however, does not exist in Australia. Australian Parliaments have, for the most part, simply set up licensing regimes. They have not specifically set out powers and immunities.

True, there is *ad hoc* legislation that applies to issues such as defence of property and citizen’s arrest as described herein. But this legislation applies to all people including security personnel and is thus not specific to them. In other words, Parliaments have avoided broadly-based legislation that covers the powers and immunities of private security officers more generally. One can sympathise. It is a difficult task to specify private police powers across the board, given the many forms and varieties of private operatives that exist and the multitude of activities in which they may be engaged.²⁶ In addition, many private security firms are, or are becoming, national and transnational corporations, and thus any general attempt to set legislated rules which transcend national and international boundaries would be difficult to do, let alone to implement and enforce.

21 Such an offence is committed if a person is caught failing to obey reasonable directions, failing to state his or her reason for being on certain premises, failing to give his or her correct name and address, failing to produce identification, hindering or assaulting or resisting a PSO in the execution of protective security duties, and impersonating a PSO.

22 The name is taken from the fictitious creature of eagle/lion that is the symbol of the City of London.

23 According to anecdotal reports, there could be up to 4000 security officers working privately in the London CBD on any given day.

24 In a similar move, South Australia Police (‘SAPOL’) has initiated a Project Griffin Steering Group (made up of SAPOL representatives and a selection of private security managers) to progress the implementation of the initiative in the Adelaide metropolitan area. Other than these variations on a ‘Griffin’ theme, there are no Griffin-style programs currently running elsewhere in Australia.

25 Richard Ericson, *Reproducing Order: a Study of Police Patrol Work* (1982) 15.

26 An attempt in Canada to bring some uniformity to the law (in this case, the law of trespass on private land) failed in the mid-1980s. See Philip Stenning, ‘Governance and Accountability in a Plural Policing Environment — the Story So Far’ (2009) 3(1) *Policing: A Journal of Policy and Practice* 22–33, 28.

Where should we proceed from here? Should Parliaments address the powers and immunities that may apply to the vast amount of policing that is now conducted by ‘private’ agents? For example, could we foresee a situation where personnel could safely rely upon immunities from suit more generally? Two initiatives that could be implemented without too much difficulty are offered here.

A. *Bona Fide Acts Immunity*

The idea of a person being protected from legal suit when exercising good faith is not novel. For example, s 74(2) of the *Civil Liability Act 1936* (SA) states that ‘[a] good Samaritan incurs no personal civil liability for an act or omission done or made in good faith and without recklessness in assisting a person in apparent need of emergency assistance.’ There is a good argument to suggest that Parliaments enact a ‘reasonable suspicion and good faith’ immunity for those engaging in a *bona fide* act of crime prevention. This could easily be done by amending civil liability legislation. The legislation might also consider a distinction between bodily harm and grievous bodily harm if providing a defence to a criminal charge.

B. *Griffin-Style Empowerment*

It is also possible to envisage legislation capable of matching and accommodating all of the circumstances in which private personnel could be called upon to assist in a Griffin-style operation. That legislation could specify what personnel can or should do in certain circumstances, what they are required to *avoid* doing, and when they can safely rely upon immunity from legal suit if they make a mistake. Clearly, any such legislation could only be activated once there was satisfaction that the required levels of training and regulation would accompany implementation.

V. CONCLUSION

As policing moves more and more into private hands, the traditional legal powers that apply to ‘policing’ are becoming outdated. The powers and immunities of private security personnel are often unclear and inconsistent, dependent upon fine distinctions, differ from jurisdiction to jurisdiction, and differ markedly from those of the public police even though security personnel are often carrying out many of the same tasks in the same precincts. The examples of rules regarding the protection of property and citizen’s arrest, as illustrated above, bear this out, and one would be forgiven for expressing some despair. By the same token, if it is possible to create legislation regarding citizen’s arrest and defence of property, it is possible to devise a legislative scheme that directs its attention more specifically to the powers and immunities of security personnel.

What should be done to remedy this situation? There is a good argument to continue to explore specific legislated immunities for private security personnel who have been suitably trained and who are engaged in *bona fide* acts of crime prevention. There is also a good argument to continue to explore legislative powers and immunities for ‘Griffin-trained’ personnel when they are called upon to engage in security tasks.

Pursuit and promotion of specific legislation and legal powers will, arguably, lift training standards for some personnel, improve public confidence, improve response capacity, and may enhance accountabilities at the same time. Each of these things would go a long way to enhancing effective policing in our communities, too.